No. 85-1384

# In the Supreme Court of the United States

OCTOBER TERM, 1986

---

WILLIAM R. TURNER, ET AL., PETITIONERS

*v.*

LEONARD SAFLEY, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

---

CHARLES FRIED
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

LOUIS R. COHEN
*Deputy Solicitor General*

ROGER CLEGG
*Assistant to the Solicitor General*

KAREN SKRIVSETH
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether a Missouri prison regulation relating to inmate-to-inmate correspondence violates the constitutional rights of prison inmates.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 2 |
| Summary of argument | 9 |
| Argument: | |
| Missouri's regulation of inmate-to-inmate correspondence does not violate the First and Fourteenth Amendments | 12 |
| A. A regulation restricting inmate freedom of expression should be sustained against First and Fourteenth Amendment challenge, if, in the reasonable judgment of prison officials, the regulation serves a legitimate penological objective | 12 |
| B. Missouri's inmate-to-inmate correspondence regulation is reasonably related to a legitimate penological objective | 19 |
| Conclusion | 25 |


## TABLE OF AUTHORITIES

Cases:


*Abbott* v. *Richardson, No.* 73-1047 (D.D.C. Sept. 13, 1984) ..... 20, 21, 22, 23, 24
*Bagley* v. *Harvey*, 718 F.2d 921 ..... 21
*Bell* v. *Wolfish*, 441 U.S. 520 ..... 7, 8, 9, 10, 11, 17, 18, 21
*Block* v. *Rutherford*, 468 U.S. 576 ..... 9-10, 17
*Cruz* v. *Beto*, 405 U.S. 319 ..... 14
*Estelle* v. *Gamble*, 429 U.S. 97 ..... 14
*Heft* v. *Carlson*, 489 F.2d 268 ..... 20
*Hudson* v. *Palmer*, 468 U.S. 517 ..... 10, 14, 19
*Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 ..... 7, 8, 9, 12, 13, 16, 18, 21
*Lee v. Washington*, 390 U.S. 333 ..... 14

Cases—Continued: Page

*Malone* v. *United States*, 502 F.2d 544, cert. denied, 419 U.S. 1124 ..... 21
*Mitchell* v. *Carlson*, 404 F. Supp. 1220 ..... 20
*Pell* v. *Procunier*, 417 U.S. 817 ..... 7, 9, 12, 14, 18
*Price* v. *Johnston*, 334 U.S. 266 ..... 14
*Procunier* v. *Martinez*, 416 U.S. 396 ..... 6, 7, 9, 10, 15, 17, 18, 22
*Schlobohm* v. *U.S. Attorney General*, 479 F. Supp. 401 ..... 20
*United States* v. *Albanese*, 554 F.2d 543 ..... 21
*United States* v. *Furukawa*, 596 F.2d 921 ..... 21
*United States* v. *Holloway*, 740 F.2d 1373, cert. denied, 469 U.S. 1021 ..... 21
*United States* v. *Lowe*, 654 F.2d 562 ..... 21
*United States* v. *Romero*, 676 F.2d 406 ..... 21
*Vester* v. *Rogers*, No. 85-6639 (4th Cir. July 18, 1986) ..... 20
*Wolff* v. *McDonnell*, 418 U.S. 539 ..... 14, 18

Constitution, statutes, and regulations:

U.S. Const.:
Amend. I ..... 10, 12, 17, 18
Amend. XIV ..... 12
28 C.F.R.:
Section 2.40(a) (6) ..... 21
Section 2.40(a) (10) ..... 21
Section 540.15(b) (3) (proposed) ..... 23
Section 540.17 ..... 1
Section 551.10 ..... 11
Section 570.36(d) ..... 21

Miscellaneous:

ABA Standards for Criminal Justice (1980) ..... 22
American Correctional Association, *Standards for Adult Correctional Institutions* (1981) ..... 22
Bureau of Prisons Operations Memorandum 7300.133 (Dec. 20, 1972) ..... 23



Miscellaneous—Continued: Page

G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Extent, Nature and Impact on Prisons* (1985) ..... 20, 22
42 Fed. Reg. 26337 (1977) ..... 23
44 Fed. Reg. 35957 (1979) ..... 23
45 Fed. Reg. 44223 (1980) ..... 23
50 Fed. Reg. (1980):
p. 40106 ..... 23
p. 40107 ..... 23
Federal Standards for Prisons and Jails (1980) ..... 22

# In the Supreme Court of the United States

OCTOBER TERM, 1986

---

No. 85-1384

WILLIAM R. TURNER, ET AL., PETITIONERS

*v.*

LEONARD SAFLEY, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS**

---

## INTEREST OF THE UNITED STATES

This case presents the question whether the Missouri Division of Corrections regulation relating to inmate-to-inmate correspondence is constitutional. The United States has a strong interest in this question because the federal prison regulation governing inmate-to-inmate correspondence is substantially similar to the Missouri regulation.[1] This Court's deci-

---

[1] The federal regulation, 28 C.F.R. 540.17, provides as follows:

> An inmate may be permitted to correspond with an inmate confined in any other penal or correctional institution, providing the other inmate is either a member of the immediate family, or is a party or a witness in a legal action in which both inmates are involved. The Warden

sion may also bear upon the constitutionality of other prison regulations, including federal prison regulations.

This case also presents the question whether a Missouri regulation relating to inmate marriages is constitutional. There is no comparable federal regulation and, except for page 11, note 7, *infra*, this brief does not discuss the constitutionality of the marriage regulation.

## STATEMENT

1. a. This is a class action for injunctive relief and damages brought in the United States District Court for the Western District of Missouri on behalf of respondent inmates of the Renz Correctional Institution in Cedar City, Missouri. Respondents challenged the constitutionality of regulations promulgated by the Missouri Division of Corrections and applicable to all prisons in the State of Missouri relating to inmate-to-inmate correspondence and inmate marriages.[2]

---

may approve such correspondence in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence. The following additional limitations apply:

(a) Such correspondence at institutions of all security levels may always be inspected and read by staff at the sending and receiving institutions (it may not be sealed by the inmate); and

(b) The Wardens of both institutions must approve of the correspondence.

[2] The respondent class also includes persons who "may be confined" at Renz and persons who wish to correspond with, or to marry, Renz inmates (see Pet. 3 n.1). In addition to



Renz is a "complex prison": it houses minimum, medium, and maximum security prisoners, both male and female (Pet. App. A2). Most of the female prisoners at Renz are in the medium and maximum security classifications; most of the male inmates are in the minimum security classification (*ibid.*). Renz is also used to provide protective custody for certain inmates (II Tr. 77-78; IV Tr. 23-24). Renz was originally built as a minimum security prison farm, and it still has a minimum security perimeter without walls or guard towers (Pet. App. A2).

The challenged correspondence regulation relates only to inmate-to-inmate correspondence.[3] It permits such correspondence "with immediate family members who are inmates in other correctional institu-

---

the two regulations before the Court, respondents also challenged a Missouri prison regulation barring former inmates from visiting a prison until after they have been out of prison for six months. The district court found that this regulation "appears to be rationally related to a proper rehabilitative interest" and that it did "not impinge on any rights sufficiently to be ruled invalid" (Pet. App. A32). That ruling is not at issue here.

[3] The regulation (Division of Corrections Reg. 20-118.010 (1) (E)) provides as follows (Pet. App. A2):

> Correspondence with immediate family members who are inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

Pursuant to the district court's order in this case, the regulation was amended to lift restrictions on inmate-to-inmate correspondence, subject to inspection for unauthorized articles and substances, threats to institutional security and safety, and evidence of illegal activity (Appellee's Br. App. H).

tions," and it permits correspondence between inmates "concerning legal matters," but it allows other inmate-to-inmate correspondence only at the discretion of each inmate's classification/treatment team (Pet. App. A2-A3). As a matter of practice, the determination whether to permit particular inmates to correspond has been based on the classification/treatment teams' familiarity with the psychological reports, conduct violations, and progress reports in the files of the inmates rather than on individual review of each piece of mail (*id.* at A3). The district court found that "the rule as practiced [at Renz] is that inmates may not write non-family inmates" (*id.* at A21).

The challenged marriage regulation permits an inmate to marry only with the permission of the superintendent of his prison and permits such approval only "when there are compelling reasons to do so" (Pet. App. A5).[4] As a matter of practice, marriage has been authorized only in cases of pregnancy or birth of an illegitimate child (*ibid.*).[5]

b. At trial, Missouri prison officials testified that the purpose of the inmate-to-inmate correspondence

---

[4] This regulation was promulgated while this litigation was pending. Before December 1, 1983, the applicable regulation (Division of Corrections Reg. 20-117.050) did not obligate the Missouri Division of Corrections to assist an inmate who wanted to get married but also did not specifically authorize the superintendent of an institution to prohibit marriage of inmates. The district court found, however, that inmates at Renz were frequently denied permission to marry. Pet. App. A4-A5, A22-A23.

[5] Like the correspondence regulation, the marriage regulation was amended pursuant to the court order that is before this Court for review (Appellee's Br. App. G). The amended regulation permits any inmate to marry.



regulation was to maintain security of the institutions administered by the Missouri Division of Corrections. They testified that control of inmate-to-inmate correspondence is important to prevent communication of plans for escape and instructions to commit violent acts, including murder (II Tr. 76-77; IV Tr. 225-228). Renz Superintendent Turner testified that he believed that the inability of inmates to communicate between institutions averted a riot at Renz when a riot occurred at another prison (II Tr. 74). Witnesses testified that the Missouri Division of Corrections had a growing problem with prison gangs, and that restricting communications among gang members—by sending them to different facilities and by restricting their correspondence—was an important element in combatting this problem (II Tr. 75-77; III Tr. 266-267; IV Tr. 226). The former director of Missouri's Adult [Prison] Institutions stated that the Missouri prison system maintained a computer list of known enemies among prison inmates so that they could be housed separately to avoid violence, but that the purpose of separating two known enemies would be defeated if one of them could write to a third person at the other inmate's prison about his problem with the other inmate (III Tr. 264-265). The then director of the Kansas Correctional Institution at Lansing testified that Kansas has an open inmate-correspondence policy that has caused problems (III Tr. 158). She testified that she believed the policy had assisted an escape because the inmates were able to determine that there was a shortage of guards (*ibid.*).

A Missouri prison official testified that it would be "impossible" to read every piece of inmate-to-inmate correspondence (IV Tr. 42-43). The Lansing director

added that piece-by-piece censorship would be tedious and a poor use of staff time (III Tr. 176).

2. The district court issued its memorandum opinion and order on May 7, 1984 (Pet. App. A19-A33). The court found that although the correspondence regulation permitted inmate-to-inmate correspondence if authorized, the practice at Renz was not to authorize inmate-to-inmate correspondence except between family members and that this practice was reflected in the Renz Inmate Orientation Booklet (*id.* at A21). The court found that this denial occurred "without a determination that the security or order of Renz or the rehabilitation of the inmate would be harmed by allowing the *particular* correspondence to proceed and *without a determination that there is no less restrictive alternative* to resolve any legitimate concerns of the Department of Corrections short of prohibiting all correspondence" (*ibid.* (emphasis added)).[6] Applying the "strict scrutiny" analysis of this Court's decision in *Procunier* v. *Martinez*, 416 U.S. 396, 413-414 (1974), the district court found that "[e]ven if some restrictions on inmate-to-inmate correspondence can be justified, the regulations and practices at bar must fall" because they are "unnecessarily sweeping" (Pet. App. A31). The court said, citing *Procunier* v. *Martinez*, *supra*, that the "regulations and practices fail to provide for the minimum constitutional procedural safeguards against arbitrary and capricious censorship" (Pet. App. A31). Finally, the court "conclude[d] that the institution can effectively cope with the problems through less

[6] The court also found that, in practice, Renz officials had on several occasions stopped inmate correspondence that would appear to be permitted by the regulation (Pet. App. A20-A22).



restrictive means, such as increase[d] scanning of the mail of potentially troublesome inmates" (*ibid.* (citations omitted)). As to the marriage regulation, the district court, relying principally on *Bell* v. *Wolfish*, 441 U.S. 520, 545-546 (1979), held that the rule "[u]nconstitutionally infringes upon [respondents'] right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state security interest, or any other legitimate interest, such as rehabilitation of inmates" (Pet. App. A28 (citations omitted)).

3. The court of appeals affirmed (Pet. App. A1-A18). It held that the district court properly analyzed the correspondence regulation under the "strict scrutiny" standard of *Procunier* v. *Martinez*, *supra*, under which, the court of appeals said, "censorship of prisoner mail is justified only if it furthers an important or substantial governmental interest unrelated to the suppression of expression, and the limitation is no greater than necessary to protect that interest" (Pet. App. A7). It distinguished *Pell* v. *Procunier*, 417 U.S. 817 (1974), which sustained a prohibition on face-to-face meetings between prisoners and newspaper reporters, on the ground that *Pell* dealt only with restrictions on the time, place, and manner of communication by inmates (Pet. App. A7-A8). It found that the Missouri correspondence regulation was not a time, place, and manner regulation under *Pell* because it barred correspondence between some inmates altogether.

The court of appeals also distinguished *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979). It concluded that *Prisoners' Union*, in which, inter alia, this Court upheld prison regulations prohibiting

the solicitation of inmates to join a prisoners' labor union and the bulk mailing of union literature to inmates, was distinguishable because the Court there found that First Amendment speech rights were "barely implicated" and that individual mailings of the literature were not banned (Pet. App. A8-A9). The court of appeals also said that "the presumption of dangerousness applied by the *Jones* Court to prisoner unions loses its force in the context of mail between two inmates in two different institutions physically separated by many miles" (*id.* at A9). The court of appeals distinguished *Bell* v. *Wolfish*, in which, inter alia, the Court sustained a regulation prohibiting pretrial detainees from receiving hardback books not mailed by the publishers or similar sources, on the ground that the detainees in *Wolfish* had other sources of reading matter whereas the prisoners here had no alternative means of communicating with particular inmates in other prisons. The court of appeals also found that letters do not pose the " 'obvious security problem' " posed by the hardback books discussed in *Wolfish* (Pet. App. A10). The court of appeals concluded that "the exchange of inmate-to-inmate mail is not presumptively dangerous []or inherently inconsistent with penological objectives" (*id.* at A12).

The court of appeals then held that the district court properly concluded that the correspondence regulation was not the "least restrictive means of achieving" the security goals of the regulation (Pet. App. A17). The court of appeals said, "As to the security concerns, we think the prison officials' authority to open and read all prisoner mail is sufficient to meet the problem of illegal conspiracies" (*id.* at A18).

The court of appeals also affirmed the district court's order striking down the marriage regulation,



again employing the *Martinez* strict scrutiny test (Pet. App. A12-A16). It again distinguished *Prisoners' Union* and *Bell* v. *Wolfish*, *supra*, on the ground that those decisions related only to restrictions on the time, place, and manner in which a right may be exercised (Pet. App. A15-A16).

## SUMMARY OF ARGUMENT

The courts below tested the Missouri inmate-to-inmate correspondence regulation by the wrong standard. A convicted and incarcerated felon retains only those First Amendment rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). The right of a prisoner to communicate with other inmates "must give way to the reasonable considerations of penal management." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 132 (1977). And because considerations of institutional security "are peculiarly within the province and professional expertise of corrections officials" (*Pell*, 417 U.S. at 827) rights of inmate-to-inmate communication surely may, like the associational rights at issue in *Prisoners' Union*, "be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such [activities] * * * possess the likelihood of disruption to prison order or stability." *Prisoners' Union*, 433 U.S. at 132. Subjecting a rule governing inmate-to-inmate correspondence to strict judicial scrutiny, and rejecting it because (in the court's view) the prison officials' objectives can be achieved by less restrictive means, are wholly inconsistent with proper deference to the judgments of prison officials. See *Block* v. *Rutherford*, 468 U.S.

576 (1984); *Hudson* v. *Palmer*, 468 U.S. 517 (1984); cf. *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

*Procunier* v. *Martinez*, 416 U.S. 396 (1974), which the courts below treated as controlling, does not govern this case. The *Martinez* Court did apply a strict standard to regulations providing for content-based censorship of prisoner correspondence with third parties, but only because the First Amendment rights of nonprisoners were involved. The Court said (*id.* at 408) that "an assessment of the extent to which prisoners may claim First Amendment freedoms * * * is unnecessary." It explained that "[w]hatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech" (*ibid.*). The Court added that "censorship of prisoner mail [in either direction] works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners" (*id.* at 409). Missouri's inmate-to-inmate correspondence regulation did not affect the rights of nonprisoners, and it was error to apply the *Martinez* standard in a case involving only those who have lost all rights inconsistent with their status as prisoners.

Missouri officials reasonably concluded that a rule barring inmate-to-inmate correspondence without prior approval (with exceptions for correspondence between family members and on legal matters) would serve the legitimate penological objectives of prison security and inmate safety. Federal prison officials have come to this conclusion as well, and have promulgated a substantially similar regulation. As an example of the concerns prompting such regulations,



prison systems today have a substantial and growing problem with prison gangs, whose collective activities threaten the safety of guards and fellow prisoners and the security of prisons generally. The usual method for dealing with gangs is to place their members in separate institutions so that they cannot communicate. If inmates are permitted to correspond with inmates in other institutions, they can continue to coordinate rebellious activities and rioting, to transmit orders for assaults (including lethal attacks) against guards and enemy prisoners, and to communicate about other illegal and disruptive actions. The choice is between more liberty for a given prisoner and more safety for others—guards and inmates alike.

Prison officials are amply justified in concluding that item-by-item censoring is not a satisfactory alternative: apart from the sheer burden on prison staff, censors may miss dangerous messages because of inattention or coding. Indeed, even if prison officials were required to adopt the "least restrictive means" in dealing with prisoner communications, they would be justified in judging the censorship alternative unsatisfactory.[7]

---

[7] The appropriate test for judging the constitutionality of Missouri's marriage regulation is also whether, in the reasonable judgment of prison officials, it serves a legitimate penological objective. In making the necessary judgment, Missouri officials had to respond to the totality of circumstances in that state's prison system. The federal policy restricting inmate marriages is more lenient (see 28 C.F.R. 551.10), but cf. *Bell* v. *Wolfish*, 441 U.S. 520, 554 (1979) ("the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions"). The United States expresses no view on the constitutionality of the Missouri marriage regulation.

## ARGUMENT

### MISSOURI'S REGULATION OF INMATE-TO-INMATE CORRESPONDENCE DOES NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

#### A. A Regulation Restricting Inmate Freedom Of Expression Should Be Sustained Against First And Fourteenth Amendment Challenge If, In The Reasonable Judgment Of Prison Officials, The Regulation Serves A Legitimate Penological Objective

A convicted and imprisoned felon "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817 (1974). The question in this case is whether a rule that restricts prisoners' freedom to communicate with other prisoners should be sustained if, in the reasonable judgment of prison officials, the restriction serves a "legitimate penological objective[]," in this case prison security, or should, as the courts below held, be subjected to strict judicial scrutiny and sustained only if it is shown to serve a compelling interest and to do so in the least restrictive possible manner.[8]

The Court has already answered this question with respect to the closely related First Amendment *associational* rights of convicted prisoners. In *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 132 (1977), the Court ruled that prisoners' associational rights (in that case, to form a union) "must give way to the reasonable considerations of penal

[8] We believe that in view of the importance of barring some inmate-to-inmate messages and the inadequacy of item-by-item censorship as an alternative, see pages 19-24, *infra*, the Missouri correspondence regulation would also survive strict scrutiny, but the Court need not reach that question in this case.



management." Elaborating, the Court said that associational rights "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations * * * possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment" (*ibid.*). Far from engaging in "strict scrutiny," the Court accepted the prison administrators' judgment that "a prisoners' labor union would be detrimental to order and security in the prisons" with the comment that it "is enough to say that [the administrators] have not been conclusively shown to be wrong in this view" (*ibid.*).

Petitioners' rule restricting inmate-to-inmate correspondence, which limits prisoners' freedom to correspond (with each other) rather than their freedom of association, should have been judged below by the same standard. The question should have been whether the prison administrators have "reasonably conclude[d]" that such correspondence "possess[es] the likelihood of disruption to prison order or stability" (*Prisoners' Union*, 433 U.S. at 132), and the regulation should have been sustained unless the prison administrators' judgment was "conclusively shown to be wrong" (*ibid.*). The fact of incarceration and the needs of prison administration require not only that convicted prisoners give up many of the rights enjoyed by members of the general public but also that a presumption of deference to prison administrators' discretion replace, with respect to many rights, the requirement of strict judicial scrutiny.

Convicted and imprisoned felons necessarily lose not only those rights that are obviously inconsistent with incarceration, but also those rights that are in-

consistent with the safety of prison personnel and other prisoners, the protection of prison property, the administration of a large and complex facility, and the achievement of penological objectives, including deterrence and rehabilitation.[9] As the Court said in *Price* v. *Johnston*, 334 U.S. 266, 285 (1948), "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." The Court made clear in *Pell* v. *Procunier*, *supra*, that "legitimate penological objectives" come first and that a prisoner retains other

[9] In *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984), the Court noted that convicted prisoners continue to have the protection of certain specific constitutional guarantees: they must have "reasonable opportunities" to practice their religion, *Cruz* v. *Beto*, 405 U.S. 319 (1972), and they are entitled to the protection of due process, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and not to be subjected to cruel and unusual punishment, *Estelle* v. *Gamble*, 429 U.S. 97 (1976). On the other hand, the Court ruled in *Hudson* that "prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells" (468 U.S. at 530).

Cases involving rights enjoyed by prisoners as such (*e.g.*, *Estelle* v. *Gamble*, *supra*) and cases involving prisoners' access to legal processes (*e.g.*, cases involving the right to counsel, to habeas corpus, and to procedural due process) present a different problem from the present case: the rights involved in those cases must logically survive the fact of conviction and incarceration. The Court has not yet had occasion to consider the extent to which the right to "reasonable opportunities" to practice one's religion, *Cruz*, *supra*, must yield to security considerations. The right to be free of racial segregation (*Lee* v. *Washington*, 390 U.S. 333 (1968)), notwithstanding its special importance, yields to "the necessities of prison security and discipline" (see *id.* at 334; *Cruz*, 405 U.S. at 321).



rights only to the extent "not inconsistent" with those objectives (417 U.S. at 822). The Court added, "[c]hallenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law" (*ibid.*).

This Court has repeatedly recognized that the unique and difficult circumstances of prison administration require wide deference to the expert judgment of administrators, particularly in the area of prison security. In *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974), for example, the Court noted that

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

In *Pell* v. *Procunier*, *supra*, after noting that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves" (417 U.S. at 823), the Court said (*id.* at 827),

> Such considerations [of institutional security and other matters] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

In *Prisoners' Union*, 433 U.S. at 126, the Court said, "Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators." As Chief Justice Burger wrote in his concurring opinion in *Prisoners' Union*, 433 U.S. at 137:

> The solutions to problems arising within correctional institutions will never be simple or easy. Prisons, by definition, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different from those imposed on society at large must prevail within prison walls. The federal courts, as we have often noted, are not equipped to "second guess" the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances.

The rights of convicted and imprisoned felons obviously must yield not merely to what a court may consider the compelling requirements of a prison system, imposed in the least restrictive manner, but to the discretion of prison administrators to adopt rules appropriate to the times and the circumstances of their particular institutions. In *Jones* v. *North Carolina Prisoners' Union, supra*, the Court expressly rejected the contention that the burden is on prison officials "to show affirmatively that [associational activities] would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order' " (433 U.S. at 128). Rather, the Court said, "[t]he necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this" (*ibid.*).



The Court has made it abundantly clear that, at least where restrictions are alleged to infringe only general liberty interests and not any other, more specific guarantee of the Constitution, the notion of "compelling necessity" and "least restrictive alternative" have no part in the analysis. In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court expressly rejected, even as to challenges to conditions of *pretrial* detention, the notion that restrictions on the liberties of lawfully incarcerated persons must meet a test of "compelling necessity" (see *id.* at 533). The Court added, "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional" (*id.* at 542-543 n.25). In *Block* v. *Rutherford*, 468 U.S. 576, 591 n.11, 1984 also involving pretrial detainees, the Court "reaffirm[ed] that [jail] administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives." See also *id.* at 580-585. A convicted felon, who may lawfully be punished, obviously has even less right than a pretrial detainee to demand that restrictions on his liberty meet a test of "compelling necessity" or that they constitute the "least restrictive alternative."

The court of appeals applied the "strict scrutiny" standard of review used in *Procunier* v. *Martinez*, 416 U.S. 396 (1974), to invalidate restrictions on prisoner correspondence with third parties. But the Court in *Martinez* specifically declined to determine the extent to which *inmates* "may claim First Amendment freedoms" (*id.* at 408). It based its ruling squarely on the First Amendment rights of the third

parties, saying "censorship of prisoner mail [in either direction] works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners" (*id.* at 409).[10] The standard of review employed in *Martinez* is thus simply inapplicable to the regulation at issue.[11]

The court of appeals distinguished *Pell* v. *Procunier*, *supra*, and *Bell* v. *Wolfish*, *supra*, on the ground that the restrictions on First Amendment rights sustained in those cases related only to "time, place, and manner" (Pet. App. A7-A9). But in both of those cases the restrictions on communications were significant restrictions, sustained because of the needs of prison security and out of deference to prison administrators, and the fact that other means of communication were available was only a "relevant" or "influenc[ing]" factor (417 U.S. at 823-824; 441 U.S. at 551-552). Conversely, in the present case, Missouri's rule hardly deprives prisoners of all means of expression. To the contrary, it bars communication only with a limited class of other people with whom, as we show below, prison authorities have specific reason to be concerned.[12]

---

[10] Shortly after deciding *Martinez*, the Court had occasion to explain: "While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, * * * this Court has not yet recognized First Amendment rights of prisoners in this context." *Wolff* v. *McDonnell*, 418 U.S. 539, 575-576 (1974) (citation of *Martinez* omitted).

[11] We do not mean to suggest that strict scrutiny is always the correct standard where non-inmates are involved. The involvement of non-inmates is a necessary but not a sufficient condition for strict scrutiny to be appropriate.

[12] The court of appeals sought (Pet. App. A9) to distinguish *Prisoners' Union* on the ground that the activities involved



At bottom, while there is no "iron curtain" between a prison and the Constitution (*Palmer*, 468 U.S. at 523), the fact of conviction and the necessities of prison administration surely change the presumptions applicable in assessing claims of infringement of constitutional rights. Governmental actions affecting constitutional rights of members of the general population, when permissible at all, must generally carry a heavy burden of justification. A convicted and imprisoned felon, however, is committed to the care and custody of prison officials who bear, under exceedingly difficult conditions, the overall responsibility for maintaining a total environment that will enhance his safety and rehabilitation and protect the safety of others. It is both essential to the operation of such a total environment and appropriate to a prisoner's status that his rights yield to legitimate penological objectives and that there be a strong presumption favoring prison officials' determinations of the conditions necessary to serve those objectives.

### B. Missouri's Inmate-To-Inmate Correspondence Regulation Is Reasonably Related To A Legitimate Penological Objective

The record amply demonstrates that the inmate-to-inmate correspondence regulation was reasonably related to a legitimate penological objective. See pages

---

in that case were (in its view) more dangerous. But the degree of deference due to the judgments of prison officials obviously does not change depending on whether the court thinks those judgments were correct. Here, the prison officials judged inmate-to-inmate correspondence sufficiently dangerous to warrant curtailment. The courts below simply substituted their own judgment that such correspondence is not very dangerous and then used the assumed lack of dangerousness as a reason for holding the regulation to strict scrutiny.

4-6, *supra*; Pet. App. A4, A17. See also *Vester* v. *Rogers*, No. 85-6639 (4th Cir. July 18, 1986) (upholding constitutionality of similar prison regulations); *Heft* v. *Carlson*, 489 F.2d 268 (5th Cir. 1973) (same); *Abbott* v. *Richardson*, No. 73-1047 (D.D.C. Sept. 13, 1984) (appeal pending) (same); *Schlobohm* v. *U.S. Attorney General*, 479 F. Supp. 401 (M.D. Pa. 1979) (same); *Mitchell* v. *Carlson*, 404 F. Supp. 1220 (D. Kan. 1975) (same). The testimony at trial showed that Missouri prison officials promulgated the correspondence regulation for security reasons. Officials testified, for instance, that they had a growing problem with prison gangs, and that restricting communication among their members—by sending them to different prisons and limiting their correspondence—was an essential tool in preventing coordinated activities threatening to safety and security (II Tr. 75-77; III Tr. 266-267; IV Tr. 226).[13] Similarly, the use of Renz as a facility to provide protective custody for certain prisoners could obviously be compromised by inmate-to-inmate correspondence (III Tr. 264-265). A corrections official further testified that he

[13] The testimony in the district court, described in the text, that prison gangs were a growing problem in Missouri is entirely plausible. A federally funded study shows that prison gangs are present in 32 state systems as well as the federal system (G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Extent, Nature and Impact on Prisons* vii, 19 (1985) [hereinafter *Prison Gangs*]). Nationwide, prisons reported a total of 12,634 gang members who constituted 3 percent of the population of state and federal prisons (*id.* at 19). The study indicates that Missouri "reported a large number of gang members (550), a relatively high percentage of all inmates as gang members [6.7 per cent] and the highest percentage of inmate problems caused by gangs (90 percent) in the United States" (*id.* at 19, 154, 159).



believed the spread of a riot in one prison to other facilities was averted by the inability of prisoners at different facilities to communicate readily (II Tr. 74). Respondents did not demonstrate that petitioners' "fears as to future disruptions are groundless" or "unreasonable" (*Prisoners' Union*, 433 U.S. at 127-128 n.5, 128); there was, conversely, no burden on the Division of Corrections to demonstrate that, without its regulation, there was a present danger to security (*Wolfish*, 441 U.S. at 551 n.32). Communication with other felons is the sort of contact which is prevented as a matter of course even after the prisoner has been released on parole (see, *e.g.*, 28 C.F.R. 2.40(a)(10) (conditioning federal parole on non-association with known criminals, unless permission is granted by the parole officer).[14]

Item-by-item censorship is not, in the judgment of prison officials, an adequate alternative to restricting correspondence. Missouri and Kansas officials so testified, see pages 5-6, *supra*, and the district court in *Abbott* v. *Richardson*, No. 73-1047 (D.D.C. Sept. 13,

[14] See also 28 C.F.R. 2.40(a)(6) and 570.36(d) (Table I, para. 8); *United States* v. *Holloway*, 740 F.2d 1373, 1383 (6th Cir.) (upholding similar restrictions), cert. denied, 469 U.S. 1021 (1984); *United States* v. *Romero*, 676 F.2d 406, 407 (9th Cir. 1982) (same); *United States* v. *Lowe*, 654 F.2d 562, 567-569 (9th Cir. 1981) (same); *United States* v. *Furukawa*, 596 F.2d 921, 922-924 (9th Cir. 1979) (same); *United States* v. *Albanese*, 554 F.2d 543, 545-547 (2d Cir. 1977) (same); *Bagley* v. *Harvey*, 718 F.2d 921, 925 (9th Cir. 1983) (requiring only "rational basis" for restriction); *United States* v. *Albanese*, 554 F.2d at 547 (requiring " 'reasonable nexus between the probation conditions and the goals of probation,' " quoting *Malone* v. *United States*, 502 F.2d 554, 556-557 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975)).

1984), slip op. 11-12 (appeal pending), so found on the basis of federal officials' testimony (see pages 23-24, *infra*). While the matter was not explored in depth below, the federal officials testified in *Abbott*—and it is obvious—that the sheer quantity of correspondence, the tedium of reading it, and the ability of inmates to use jargon or more sophisticated codes to escape detection of their real messages, make item-by-item censorship a very unsatisfactory way to protect security.[15]

In considering the reasonableness of a California prison regulation in *Martinez*, 416 U.S. at 414 n.14, the Court said that, "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."[16] The Missouri inmate-to-inmate correspondence regulation at issue is substantially similar to the federal Bureau

---

[15]See also *Prison Gangs*, page 20 note 13, *supra*, at 130 (discussing "frequent[]" use of coded correspondence by gangs in federal prison). The amicus brief filed in this case by the State of Texas contains further examples of codes used by prisoners.

[16] The Missouri regulation is also consistent with Section 12.02 of the Federal Standards for Prisons and Jails (1980). See also American Correctional Association, *Standards for Adult Correctional Institutions* 2-4370 (2d ed. 1981) (limit on source of mail permitted "when there is a reasonable belief that the limitation is necessary to protect public safety or institutional order and security"). But compare ABA Standards for Criminal Justice 23-6.1 (1980) (while "restrictions on correspondence with other prisoners might well pass constitutional muster," the standard proposed nonetheless requires that such restrictions meet the same "least restrictive" standard that governs restrictions on correspondence with nonprisoners).



of Prisons regulation on the same subject.[17] The present federal regulation was promulgated October 1, 1985, as part of a general revision of correspondence regulations to clarify them and address interpretation issues that had arisen since promulgation of earlier regulations (50 Fed. Reg. 40106 (1985)).[18] In promulgating the revised correspondence regulation—which was substantially the same as its predecessors—the Bureau of Prisons stated that it "believes its rule is necessary to help ensure institution security and good order. The rule clearly identifies the specific conditions under which such correspondence is allowed, and allows the Warden to approve additional reasons in other exceptional circumstances" (*id.* at 40107). See also 45 Fed. Reg. 44223 (1980).

The federal inmate-to-inmate correspondence regulation was recently upheld, against challenges similar to the attacks on the Missouri correspondence regulation, in *Abbott* v. *Richardson*, No. 73-1047 (D.D.C. Sept. 13, 1984) (appeal pending). The *Abbott* court wrote (slip op. 11-12) that prison officials had testified that

> prisoner-to-prisoner mail could be used for communication between members of prison gangs:

---

[17] See pages 1-2 note 1, *supra*.

[18] The Bureau of Prisons originally proposed approval of inmate-to-inmate correspondence between persons other than close relatives or parties and witnesses in the same court action "only if the correspondence * * * [i]nvolves a relationship between the confined inmates which existed prior to commitment and both institutions agree that the correspondence is beneficial to both inmates" (proposed 28 C.F.R. 540.15 (b) (3) (42 Fed. Reg. 26337 (1977)). See also 44 Fed. Reg. 35957 (1979); Bureau of Prisons Operations Memorandum 7300.133 at 6 (Dec. 20, 1972).

in particular it could be used to arrange assaults on inmates who are transferred under the [federal system's] protective custody program. Testimony on the conduct of prison gangs indicated that this is not a remote possibility. There was evidence, too, that prisoners have succeeded in sending letters to one another in order to carry on drug transactions and formulate escape plans. The [prisoners] suggest that the risk of such problems could be handled by monitoring correspondence; but the [officials] reply that they could not hope to monitor a sufficient number of letters, and in any event, prisoners could easily write in private jargon that prison authorities would not understand. Thus no less restrictive policy than a general ban on inter-inmate correspondence is in the interest of security. The court sustains this position.

The testimony given by federal officials and accepted by the court in *Abbott* thus underscores the serious security problems posed by inmate-to-inmate correspondence and the impossibility (because of volume and the use of jargon or code) of relying on item-by-item censorship. Prohibiting such correspondence is an entirely reasonable step in pursuit of the legitimate objective of penal security.[19]

---

[19] The fact that the ban on inmate-to-inmate correspondence is not perfectly effective to stop all communication between inmates of different prisons (*e.g.*, a third party on the outside could broker information) does not preclude a prison from invoking it. A net with a hole in it (of indeterminate size) is better than no net at all.



## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

LOUIS R. COHEN
*Deputy Solicitor General*

ROGER CLEGG
*Assistant to the Solicitor General*

KAREN SKRIVSETH
*Attorney*

AUGUST 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20298